IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1289

GERALD MARKER, *et al.*,
Petitioners (Intervenors),

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*,
Respondents (Plaintiffs),

and

NATIONAL RIGHT TO WORK LEGAL DEFENSE AND EDUCATION FOUNDATION, INC., *et al.*,
Respondents (Defendants).

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONERS TO BRIEF IN OPPOSITION OF RESPONDENTS (PLAINTIFFS)

GODFREY P. SCHMIDT
Suite 1606
654 Madison Avenue
New York, New York 10021
(212) 371-7290

GLENN H. CARLSON
Perito, Duerk and Carlson, P.C.
Suite 1200
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 659-8300

Attorneys for Petitioners

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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This Reply Brief is submitted pursuant to Rule 24(4) of the Rules of this Court.

The "Brief in Opposition for Plaintiff Union Respondents" calls, by way of arguments first raised therein, for correction, as well as reorientation to the

real issues. This can be accomplished with brevity and without the "unwarranted impositions on the time of this Court" (p. 5)[1] which Respondents solicitously deprecate.

A. In their paragraph numbered "2" (p. 2), Respondents misstate the issue. The real issues are whether Petitioners were entitled to intervention under Rule 24(a) F.R.C.P.; and whether there is any statutory or other warrant for the type of permissive intervention manqué allowed by the District Court or for striking Petitioners' Answer simply because it went beyond the feckless intervention granted.

B. The Second Amended Complaint does not allege that Respondents seek an injunction or other relief against "the continuing instigation and financing, by interested employers through the Defendant Committee and Foundation, of . . . suits by union members against their unions" (p. 2). Still, if it did, the application for injunction would lack, as essential parties, the targeted "interested employers", whom the Second Amended Complaint never identified.

"Interested employers" not only have an interest in this controversy, they have an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final termination may be inconsistent with equity and good conscience. "Interested employers", as well as Petitioners, are "real parties in interest", as was pointed out in the motion papers presented to the District Court.

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[1] Numbers in parentheses signify pages of Respondents' Brief In Opposition; numbers in parentheses followed by a small "a" indicate pages of Petitioners' Appendix.

C. The words, "collusion" or "collusive" (p. 4, *et seq.*), according to all dictionaries, imply either a *secret* agreement or an agreement *to defraud*. The papers submitted below by Petitioners on their application for intervention show that Petitioner-Intervenors never made a secret of Godfrey Schmidt's limited relationship to Defendant Foundation; and that he had no connection at all with Defendant Committee.

The "red herring" of collusion was injected for the first time in this case by "Plaintiffs' Supplemental Opposition to Motion to Intervene", submitted below by counsel for Respondents.[2] Had the Courts below found collusion, not even the limited permissive intervention allowed would have been granted. Nothing in the Record indicates that the Courts below took seriously Respondents' "collusion" insinuations or regarded them as relevant or significant.

If successful, Respondents' efforts to prevent presentation of the valid and relevant issues, affirmative defenses and counterclaim set forth in Petitioners' Answer (pp. 9a-75a) would result in suppression of what is relevant. The real issue herein is whether a District Court should be allowed to nullify Rule 24(a) F.R.C.P. by granting a merely nominal permissive intervention which makes the Intervenors mere spectators and strips them of the right to defend their *undenied* interests. The irrelevant and artificial thrusts about "collusion" obscure that real issue.

D. That Petitioners are *not* "fighting for precisely the same right" (p. 5) as Defendants below is

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[2] "Plaintiffs Opposition to Motion to Intervene" had been filed January 19, 1976; "Plaintiffs' Supplemental Opposition for Motion to Intervene" was filed May 21, 1976.

demonstrated by a comparison of Intervenors' Answers with Defendants' Answer (pp. 9a-75a). Resorting to metaphor, Respondents say that Intervenors' right and Defendants' right "are two sides of the same coin". The only value of the metaphor is to show, as do the Answers aforesaid, that the two sides of the coin are *not* the same, and in fact are very different.[3]

E. If, as Respondents claim, "the only relevant question here is the alleged . . . right of donees, donors, employees, the Right to Work Committee and the Foundation to 'interested employer' financing of anti-union suits" (p. 6), one is left to wonder about two indisputable facts:

(i) The Second Amended Complaint does not name as defendant, nor describe, nor identify in any way, a single "interested employer"; nor does it define what Respondents mean by "anti-union". Apparently, the twenty-five lawsuits in other courts listed in the Complaint (pp. 21a-28a) are self-evidently "anti-union"!

(ii) After four years of litigation in this case (most of which concentrated on discovery), neither Plaintiffs, nor their Second Amended Complaint, nor the Courts below ever defined "interested employer".

Pitched against this background lies the limp *ipse dixit* that "intervenors failed to make 'timely application' for intervention" (p. 7)![4] By contrast,

[3]The conflict of interest between the Defendants and Petitioners emerges into clear light in the still continuing, but already four-year-old, controversy between Plaintiffs and Defendants below concerning disclosure of the names of Foundation's contributors. It is Foundation, not Petitioners, which has refused that disclosure. It is in the interest of Foundation, not the interest of the Petitioners as recipients of the Foundation's legal-aid, which as been advanced by that long struggle about discovery.

[4]On March 4, 1976, Judge Richey said (App. below 207): "I do think we have had this case – why, goodness gracious, it is a 1973 case, and here we still are in a very preliminary stage." On

(continued)

Respondents have failed to present a "case" or "controversy" under Article III, Section 1 of the Constitution of the United States, since no facts showing violation of law are alleged in the Second Amended Complaint. The latter purveys only unspecific and general conclusions of fact and of law about past, present and future lawsuits *in other courts* to which Respondents' (Plaintiffs') present claims were not presented.

Apart from Petitioners, no one in this case, whether party or Judge, has ever, during four years of litigation, posed or addressed what is now termed the "only relevant question" (p.6), a purely legal question at best. It is a question not even raised by the Second Amended Complaint. What the Second Amended Complaint really demands is an advisory opinion, an answer to an abstract question: "What does 'interested employer' mean?" The Second Amended Complaint contains no specific fact allegation on the subject, nor any fact allegation showing wrong-doing by Defendants. It fails to disclose adquate information as the basis of claim against the Defendant Foundation. It is a series of bare averments that Plaintiffs want relief and are entitled to it.

(footnote continued from proceeding page)

March 8, 1976, Mr. Silard, of counsel for plaintiffs, said (App. below 223) ". . . I would like . . . to amend the pleading [complaint] so that I am not barred on any technical basis . . . (App. below 224) I formally move to amend the pleadings to add the allegation that they [defendants] are an association of employers. . . . The Court. Well, I think what you had better do, Mr. Silard, is to make your motion in the usual course and allow the defendants [not the intervenors] to respond to it . . . . Mr. Silard . . . . Our clients are very unhappy. It has been three years since we filed this suit for them [on May 1, 1973] . . . . [W]e are essentially not one step closer, or not many steps closer to the judgment." (App. below 225).

In any event, the Court below did not rule or suggest that Petitioners' application for intervention was untimely.

F. Equally unavailing is another metaphor used in Respondents' Brief: "The Intervenors are not a new voice but simply an addition to the chorus of defendants' lawyers" (p. 6). On the basis of this simile, the "new voice" sings one song (Intervenors' Answer) and "the chorus of defendants' lawyers" sings, discordantly, another and different song (Defendants' Answer).

G. The *Stewart-Warner* case (p. 8)[5] admittedly reveals the Second Circuit's intention ". . . to permit adjudication of all claims in one forum and in one suit . . . ." That is the reason why Intervenors want to be heard on the basis of their Answer. Respondents' effort to distinguish that case is wasted. Respondents' reliance (p. 8) on *Ionian Shipping Co. v. British Law Ins. Co.*, 426 F.2d 186 (2nd Cir. 1970) is misplaced, as the Second Circuit there speaks to intervenors as plaintiffs, *not*, as herein, to intervenors as defendants.

H. Petitioners did not predicate their due process argument on the sole ground that the "disabling permissive intervention allowed . . . by the Courts below binds them under a possible judgment in this case". Petitioners' main reliance was upon the absence of due process in denying intervention *of right* in violation of Rule 24(a) F.R.C.P., and of striking their Answer arbitrarily. In any event, Respondent-Plaintiffs admittedly seek an injunction against the Defendants (p. 2) and summary judgment[6] (p. 3). If the District Court grants summary

[5] Stewart-Warner Corp. v. Westinghouse Electric Corp., 325 F.2d 882 (2nd Cir. 1963), cert. denied, 376 U.S. 944 (1964).

[6] The Respondents' Brief (pp. 3-4) refers to the pendency before the District Court of an order to show cause (issued *sua sponte* by the District Court) why summary judgment should not be entered for Respondents. Argument on this motion, as well as others now pending below, has been fixed for April 26, 1977.

judgment or enjoins financing of employee suits by Foundation, that would cut off legal aid to Petitioners – legal aid in which they have an *uncontroverted* interest, and which alone makes their lawsuits possible. Before being denied that interest, and before their lawsuits are thus, for all practical purposes, aborted, Petitioners are entitled to such a hearing as due process requires. The injunction Respondents seek (p. 2), whether or not constituting an order "pertaining to the matter for which intervention was permitted" (p. 8), would necessarily, and for all practical purposes, injure Petitioners and prejudice their interests. This is true even if there were doubt that the injunction order would be binding upon Petitioners as permissive intervenors. (p. 8)

I. Petitioners cite *Kozak v. Wells*, 278 F.2d 104, (8th Cir. 1960) in their Petition. Respondents rely on a *dictum* in that case (p. 7), as the Court of Appeals in that case found no collusion (278 F.2d at 114). *Kozak*, however, emphasizes the error of the District Court in strking Petitioners' Answer (278 F.2d at 109), in denying intervention of right (278 F.2d at 108) and in holding that Petitioners are adequately represented (278 F.2d at 109-110).

The remaining parts of Respondents' Brief simply *assume*, as does the Second Amended Complaint, wrongdoing in Defendants and in unidentified employers whom they *assume* to be "interested".

CONCLUSION

For the reasons set forth hereinabove, and in the original Petition, a writ of certiorari should be granted; or in the alternative, Petitioners pray this Court (in the interest of speedy justice and due process) to exercise its powers of supervision over all federal courts by remanding this case to the District Court with instructions to grant Petitioners intervention *of right* and to reinstate their Answer.

Respectfully submitted,

GODFREY P. SCHMIDT
Suite 1606
654 Madison Avenue
New York, New York 10021
(212) 371-7290

GLENN H. CARLSON
Perito, Duerk and Carlson, P.C.
Suite 1200
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 659-8300

Attorneys for Petitioners

April 27, 1977